Safege Consulting Engineers v Ranhill Bersekutu Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–140 OF 2003
ABDUL AZIZ, RICHARD MALANJUM AND NIK HASHIM JJCA
23 NOVEMBER 2004

Arbitration — Arbitrator — Jurisdiction — Whether arbitrator appointed pursuant to main agreement has jurisdiction to determine issues governed by separate agreement

Equiventures Sdn Bhd appointed the respondent ('Ranhill') and the appellant ('Safege'), a firm of consulting engineers from France, to provide consulting services related to a project for privatization of water supply system. The appointment was done by an agreement for consulting services ('the Agreement') between, on the one part, Equiventures Sdn Bhd as 'the Employer' and, on the other part, Ranhill 'in association with' Safege, called 'the Engineer'. Ranhill and Safege entered into a separate agreement called memorandum of association ('the Memorandum') to lay down the rights and obligations as between them in respect of the consulting services to be given under the Agreement. Both the Agreement and the Memorandum have their respective arbitration clauses. Differences having arisen under the Agreement, the Employer commenced arbitral proceedings. Ranhill and Safege were made jointly and severally responsible. Ranhill, the first respondent in the arbitration, issued to Safege, the second respondent, a notice of contribution in the arbitration. By the notice of contribution Ranhill sought to have the arbitrator, who was chosen or appointed under the Agreement to arbitrate a dispute between the Employer and the Engineer 'upon or in relation to or in connection with' the Agreement or any part of it, to also arbitrate the question of contribution and indemnity between Ranhill and Safege under the Memorandum. Safege asserted that the arbitrator had no jurisdiction to determine the matter of contribution, Ranhill applied to the High Court for a declaration that the arbitrator had 'jurisdiction and/or substantive powers arising from the Agreement and as per the pleading before the arbitrator to adjudicate on the notice of contribution, which was said to be under ss 10(1)(c) and 10(2) of the Civil Law Act 1956. The High Court granted the declaration. Hence, Safege filed this appeal.

Held, allowing the appeal:

Under section 4.07 of the Agreement, the arbitrator's jurisdiction is only to arbitrate disputes between the Employer and the Engineer and not also to arbitrate internal disputes between the components of the Engineer, even if the disputes could be said to arise 'upon or in relation to or in connection' with the Agreement (see para 15).

[**Bahasa Malaysia summary**

Equiventures Sdn Bhd telah melantik responden ('Ranhill') dan perayu ('Safege'), sebuah firma jurutera-jurutera perunding dari Perancis untuk memberi perkhidmatan perundingan mengenai projek penswastaan sistem bekalan air. Pelantikan tersebut dibuat melalui satu perjanjian bagi perkhidmatan perundingan ('perjanjian tersebut') di antara, dalam satu pihak, Equiventures Sdn Bhd sebagai majikan dan, dalam pihak yang lain Ranhill bersama Safege, dipanggil 'jurutera tersebut'. Ranhill dan Safege memasuki perjanjian yang lain yang dipanggil memorandum pertubuhan ('memorandum tersebut') untuk menyatakan hak dan tanggungjawab di antara mereka mengenai perkhidmatan perundingan yang harus diberi di bawah perjanjian tersebut. Kedua-dua perjanjian dan memorandum tersebut mempunyai klausa timbang tara masing-masing. Pertikaian timbul di bawah perjanjian tersebut, majikan memulakan tindakan timbang tara. Ranhill dan Safege dijadikan bertanggungjawab bersama dan berasingan. Ranhill, responden pertama dalam timbang tara keluarkan kepada Safege notis sumbangan dalam timbang tara. Melalui notis sumbangan Ranhill ingin penimbang tara yang dipilih atau dilantik di bawah perjanjian tersebut untuk menimbang tara satu pertikaian di antara majikan dan jurutera tersebut 'sekali atau mengenai atau berhubungan dengan' perjanjian tersebut atau apa-apa bahagiannya, untuk juga menimbang tara soalan sumbangan dan indemniti di antara Ranhill dan Safege di bawah memorandum tersebut. Safege mengatakan timbang tara tersebut tidak mempunyai jurisdiksi untuk memutuskan perkara mengenai sumbangan. Ranhill pohon kepada Mahkamah Tinggi untuk satu deklarasi bahawa penimbang tara tersebut mempunyai jurisdiksi dan/atau kuasa substantif bangkit daripada perjanjian tersebut dan mengikut pliding di hadapan penimbang tara untuk memutuskan mengenai notis sumbangan, yang dikatakan di bawah seksyen 10(1)(c) dan 10(2) Akta Udang-Undang Sivil 1956. Mahkamah Tinggi memberikan deklarasi yang dipohon. Maka, rayuan ini dibuat oleh Safege.

Diputuskan, membenarkan rayuan itu:

Di bawah seksyen 4.07 perjanjian tersebut, jurisdiksi penimbang tara adalah hanya untuk menimbang tara pertikaian di antara majikan dan jurutera tersebut dan bukan untuk menimbang tara pertikaian dalaman di antara komponen 'jurutera tersebut', walaupun pertikaian tersebut boleh dikatakan wujud 'sekali atau mengenai atau berhubungan' dengan perjanjian tersebut (lihat perenggan 15).]

Notes

For cases on jurisdiction of arbitrator, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1113–1119.

For arbitrator's jurisdiction, see 13 *Halsbury's Laws of Malaysia*, para [220.077].

A **Cases referred to**

Societe Commerciale De Reassurance v Eras International Ltd [1992] 1 LLR 570 *(The Eras Eil Actions)* (refd)

Wealands (widow and administratix of the estate of Brian Wealands, deceased) v CLC Contractors Ltd and others 74 Con LR 1 (refd)

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Legislation referred to

Civil Law Act 1956 ss 10(1)(c),(2)

C *Khoo Guan Huat (Kua Lay Theng with him) (Skrine) for the appellants.*
MNagarajah (Sherene Lee with him) (Shook Lin & Bok) for the respondents.

Appeal from: Originating Motion No R1–25–121 of 2002 (High Court, Kuala Lumpur)

D **Abdul Aziz JCA** (delivering judgment of the court):

[1] Equiventures Sdn Bhd were under an obligation to the Government of the State of Johor to carry out certain works related to a project for the privatization of water supply system in the district of Johor Bahru. Intending **E** to carry out the works, they appointed the respondent company ('Ranhill') and the appellants ('Safege'), a firm of consulting engineers from France, to provide consulting services related to the works. The appointment was done by an agreement for consulting services dated 12 October 1992 ('the Agreement') between, on the one part, Equiventures Sdn Bhd as 'the Employer' and, on **F** the other part, Ranhill 'in association with' Safege, the association of Ranhill and Safege being called 'the Engineer'. It was by that term in the singular, 'the Engineer', that Ranhill and Safege were referred to throughout the Agreement, except where it was necessary to refer to them separately. This was done in paragraph (v) of the recital, where it was declared that 'RANHILL and SAFEGE will be jointly and severally responsible to the Employer for the **G** consulting services …' and that 'RANHILL will be the lead firm …', then in section 1.02, which provided for the sharing of the services (or the division of works) between the two entities, then in sections 2.11 and 2.12, which concerned tax matters touching Safege and Ranhill separately, and finally in section 2.14 and Table B1, which concerned payment and remuneration.

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[2] As regards to the division of work, among the matters provided in Section 1.02 was that for Stage 1 works, Safege 'will be responsible for intake, raw water pumping station, water treatment plants and pumping stations'.

[3] Section 4.07 contained an arbitration agreement in the following words **I** 'If at any time any question, dispute, or difference of opinion shall arise between the Employer and the Engineer upon or in relation to or in connection with this Agreement or any part thereof either party may forthwith give to the

other notice in writing of the existence of such question, dispute or difference of opinion and the same shall be referred to the arbitration of a person to be mutually agreed upon or failing agreement … then to some person appointed by the president of the board of Engineers, Malaysia …'.

[4] On 19 January 1993, Ranhill and Safege entered into a separate agreement called Memorandum of Association ('the Memorandum') to lay down the rights and obligations as between them in respect of the consulting services to be given under the Agreement. Article 1 declared that they associated themselves with each other for the sole purpose of executing and carrying out the Agreement. It went on to provide as follows:

> All terms and conditions in the Agreement shall apply equally and form part ofthis Memorandum of Association. The Agreement shall prevail over this Memorandum for any interpretation of the consulting services to be performed under the Agreement.

[5] Article 3 provided for the sharing of the services (or the division of work) between Ranhill and Safege. The differences between section 1.02 of the Agreement and art 3 of the Memorandum, and the significance of the differences, had not been the subject of submission before us, but it would appear from art 7.1 that, as between Ranhill and Safege, the division of work in art 3 was to prevail over that in section 1.02 of the Agreement.

[6] It is necessary to reproduce art 7 in its entirety because there are provisions in it, apart from art 7.1, that are also important:

> 7.1 It is expressly agreed that the joint commitment which exists between the parties towards the Employer is valid only with respect to the Employer and the Government of Johor.
>
> Notwithstanding provisions made in the Service Agreement with the Employer in Section 1.02, each party remains responsible for fulfilment of the tasks assigned to him under the terms of Article 3 of the present Memorandum of Association and for consequences of these tasks with respect of [sic] the other party and third parties.
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> 7.2 The rules set out above shall notably apply to possible penalties which could be imposed by the Employer or the consequences resulting for [sic] termination of the Agreement for non-performance by one of the parties of its contractual obligations.
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> Each party declares that it is at present insured against the risks inherent in its civil and professional liability.
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> Each party shall alone be responsible for its obligation and commitment with regard to third parties and its personnel and shall alone bear the consequences thereof.
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> 7.3 If one of the parties is subject of a claim resulting from the services provided by the other party, the other party shall handle the claim and support the resulting costs.

7.4 If a claim cannot clearly be attributed to a single party, the costs shall be provisionally divided between the parties proportional to their financial share in the Agreement, until a final distribution has been fixed based on the contractual obligations of each party concerned.

7.5 The final distribution mentioned above in 7.4 will be proportional to the financial share of the parties in the Agreement if the liability of the Association is due to decisions taken by common agreement of the parties, with no specific responsibility of one party.

7.6 If the parties cannot agree on a final distribution within 60 days, this distribution will be settled by arbitration according to the procedure described in Article 13.

[7] Leaving aside the question of the meaning and significance of specific provisions of art 7, it is clear from a reading of art 7 as a whole that Ranhill and Safege each wanted to make sure that as between them, notwithstanding that their obligations under the Agreement to the Employer were joint and several, each would only bear the consequences of their own failures. If it was not clear who should bear the 'costs' of a claim, art 7.4 provided for a provisional apportionment of the 'costs' until a final distribution was arrived at, if necessary by arbitration according to the procedure described in art 13.

[8] The first paragraph of art 13 provided as follows:

All disputes arising in connection with the present Memorandum of Association which cannot be amicably settled shall be finally settled by an appointed arbitrator of the Board of Engineers, Malaysia to be mutually agreed by both parties. In the event that such agreement cannot be achieved within a period of thirty (30) days, the selection of arbitrator shall be carried out by the Professional Engineers Board, Singapore, whose appointed arbitrator shall be final for the settlement of the disputes.

[9] Differences having arisen under the Agreement, the Employer commenced arbitral proceedings under section 4.07 of the Agreement against Ranhill and Safege. It was a claim in contract and in tort for breaches of obligations and duties for which Ranhill and Safege were made jointly and severally responsible. Their contractual undertaking was stated in para 11 of the points of claim to be 'to prepare the drawings, plans, specifications, make provisions and procure by the end of Stage 1, the construction of a properly conceived raw water intake structure …' of a specific capability.

[10] On 17 September 2002 Ranhill, the first respondent in the arbitration, issued to Safege, the second respondent, a notice ('notice of contribution') in the arbitration. In para 3.0 of the notice of contribution, Ranhill claimed that Safege 'was responsible for all drawings, plans and specifications of the raw water intake complex and the raw water pumping station during Stage 1 …'. Paragraphs 9.0 and 10.0 stated as follows:

9.0 The First Respondent hereby claims against the Second Respondent to be indemnified against the Claimant's claims and the costs of this arbitration on the ground that the breach of contractual duties and/or negligence resulting in the Claimant's loss and damage (which is not admitted) was caused by the Second Respondent while in association with the First Respondent by virtue of the Agreement for Consulting Services and/or Memorandum.

10.0 The First Respondent is entitled to contribution and/or indemnity from the Second Respondent in respect of any sum which the Claimant may recover herein against the Second Respondent to the extent of such amount as may be found by the Arbitrator to be just and equitable, having regard to the Second Respondent's scope of responsibility under the Agreement for Consulting Services and/or Memorandum for such damages on the ground that the Second Respondent's breach of contractual duties and/or negligence was the sole cause of the Claimant's claim.

[11] It is clear that by the notice of contribution Ranhill sought to have the arbitrator, who was chosen or appointed under section 4.07 of the Agreement to arbitrate a dispute between the Employer and the Engineer 'upon or in relation to or in connection with' the Agreement or any part of it, to also arbitrate the question of contribution and indemnity between Ranhill and Safege under the Memorandum.

[12] Because Safege asserted that the arbitrator had no jurisdiction to determine the matter of contribution, Ranhill applied to the High Court for a declaration that the arbitrator had 'jurisdiction and/or substantive powers arising from [section 4.07 of the Agreement] and as per the pleading before the arbitrator to adjudicate on' the notice of contribution, which was said to be under ss 10(1)(c) and 10(2) of the Civil Law Act 1956. The High Court granted the declaration. The appeal before us, which we allowed, was Safege's appeal from that decision of the High Court.

[13] In the appeal, Safege advanced various reasons for asserting that the arbitrator had no jurisdiction to arbitrate the contribution question. The foremost and the most direct reason was that an arbitrator's jurisdiction is derived, besides statute, solely from the arbitration agreement or clause, in this case section 4.07 of the Agreement, but section 4.07 did not include jurisdiction over the contribution question. The jurisdiction given to the arbitrator by section 4.07 was to arbitrate any question, dispute or difference of opinion that should arise between two parties, namely, the Employer and an association called the Engineer, which was an association of Ranhill and Safege. And the question, dispute or difference must arise upon or in relation to or in connection with the Agreement, under which the association, that is the Engineer, or either of Ranhill or Safege, would be liable to the Employer, irrespective of which of them was actually at fault. But the question of contribution was a dispute between Ranhill and Safege, a dispute which did not concern the Employer, under a different agreement with an arbitration clause of its own, one with a different mode of choosing an arbitrator from that in section 4.07 of the Agreement. Two arbitrations were in fact, Safege

contended, contemplated by Ranhill and Safege, if necessary. One was under section 4.07 of the Agreement to deal with disputes between the Employer and the Engineer and another under art 13 of the Memorandum to resolve disputes relating to contribution between Ranhill and Safege following upon an award in the arbitration between the Employer and the Engineer.

[14] The declaration that Ranhill sought in the High Court was essentially a declaration as to the jurisdiction of the arbitrator. By 'jurisdiction' I mean arbitral domain, that is to say, the kind of matters that an arbitrator is required to arbitrate in a particular case, and the kind of people between whom he is to arbitrate those matters. It is very important in this case to distinguish jurisdiction in that sense from the powers of an arbitrator, by which I mean the remedies and tools that are available to an arbitrator to use in his arbitral domain. The jurisdiction of an arbitrator is conferred and defined by the arbitration agreement, that is the arbitration clause in an agreement, in this case section 4.07 of the Agreement. Whether the arbitrator has jurisdiction to arbitrate any dispute between Ranhill and Safege as to contribution between them must be determined by a proper construction of section 4.07.

[15] In the appeal, Ranhill, through their counsel, construed section 4.07 by focussing on the fact that a question, dispute or difference of opinion that is to be referred to arbitration is one that arises 'upon or in relation to or in connection with this Agreement'. Ranhill argued that as the question of contribution arose solely from the Employer's claim, and since the Employer's claim was a claim under the Agreement, therefore the question of contribution arose 'upon or in relation to or in connection with' the Agreement. But their argument conveniently overlooked the fact that the question, dispute or difference of opinion must also arise between the Employer and the Engineer. However it may be argued that a controversy is connected somehow with the Agreement, the controversy cannot be referred to arbitration under section 4.07, and the arbitrator does not have jurisdiction to arbitrate the controversy, unless it is one that arises between the Employer and the Engineer. From the fact that Ranhill and Safege needed to enter into the Memorandum, besides the fact that the Agreement had those features and terms that have been set out, there could be no doubt that the Employer, in case of default, was not concerned with the question of who, as between Ranhill and Safege, was responsible. To the Employer they would be liable to them jointly and severally. The question of contribution between Ranhill and Safege could not therefore be a question arising between the Employer and the Engineer. It follows that the arbitrator has no jurisdiction to arbitrate that question. Under section 4.07, the arbitrator's jurisdiction is only to arbitrate disputes between the Employer and the Engineer and not also to arbitrate internal disputes between the components of 'Engineer', even if the disputes could be said to arise 'upon or in relation to or in connection' with the Agreement'.

[16] For that reason I was of the view that the appeal should be allowed. And there should be nothing more to say, but for Ranhill, through their counsel, also arguing extensively and vigorously about s 10(1)(c) of the Civil Law Act 1956, which provides as follows:

> Where a damage is suffered by any person as a result of a tort (whether a crime or not) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

[17] A good deal of the argument, which proceeded on the basis that the Employer's claim was in tort as well as contract, went in an endeavour to show that the provision is applicable in an arbitration, so that an arbitrator has the power to order contribution between tortfeasors. It was therefore argued that the arbitrator in this case had the jurisdiction under section 4.07 to arbitrate the question of contribution between Ranhill and Safege.

[18] Here comes the importance of distinguishing between jurisdiction and power that I mentioned earlier. Even if an arbitrator has power to order contribution pursuant to s 10(1)(c), that is only a power, a remedy or a tool available to an arbitrator to use in his arbitral domain. But he must first have that domain, that jurisdiction. If he has not got the domain, the jurisdiction, the question of the power, remedy or tool is irrelevant. In this case, even if the arbitrator has power to order contribution pursuant to s 10(1)(c), he has not got the jurisdiction to exercise that power to resolve any question of contribution between Ranhill and Safege because his jurisdiction under section 4.07 is confined to disputes between the Employer and the Engineer. The power to order contribution, if it exists, cannot confer jurisdiction that does not exist.

[19] Since the question of power to order contribution is irrelevant, that is to say, since the arbitrator has no jurisdiction under section 4.07 to determine questions of distribution between Ranhill and Safege, even if he has power to order contribution pursuant to s 10(1)(c), I should have nothing more to say about contribution. But since in submitting that an arbitrator has power to order contribution, Ranhill's counsel referred to *Societe Commerciale De Reassurance v Eras International Ltd* [1992] 1 LLR 570 *(The Eras Eil Actions)* and *Wealands (widow and administratix of the estate of Brian Wealands, deceased) v CLC Contractors Ltd and others* 74 Con LR 1 as authorities that have a bearing on the question of contribution in this case, I have something to say about those cases.

[20] As to the state of affairs in *The Eras Eil Actions*, I will quote what ManceLJ said in para 20 of his judgement in *Wealands*:

In that litigation, Clarksons wished to pursue a claim for contribution under the 1978 Act against their pool agents, Howdens. The agency agreement between them incorporated an agreement to submit disputes to arbitration in Illinois. In Illinois, no power to award contribution existed even in litigation. A stay to enforce arbitration in Illinois would therefore deprive Clarksons of any possibility of claiming contribution. This court held, none the less, that there was a dispute between the parties within their arbitration agreement and that a stay must be granted.

[21] There was litigation in court with, apparently, Clarksons as a defendant or the defendant. Clarksons had an agency agreement with Howdens, Clarkson's pool agents, which incorporated an agreement to submit disputes to arbitration in Illinois. Clarksons wished to claim, in the court action, contribution from Howdens. Apparently Howdens applied for a stay of the court action so that the dispute between Clarksons and Howdens could be arbitrated in Illinois pursuant to the arbitration agreement. But there was no power to award contribution in Illinois, not even with the courts. So it was presumably argued by Clarksons that stay should not be granted because, if granted, and the dispute was arbitrated in Illinois, Clarksons would be deprived of any possibility of claiming contribution. Stay was nonetheless granted. Since the parties agreed to settle disputes by arbitration, they must go to arbitration in Illinois notwithstanding that Clarksons' remedies there might not be as ample as they were thought to be were the dispute to be settled by action in court in the United Kingdom.

[22] The thing to note about that case — in which the question of power to order contribution in an arbitration arose through an application for a stay of court proceedings — is that, unlike in this case, there was no problem of jurisdiction in the sense in which I have used the word. The arbitration agreement was between Clarksons and Howdens and the question of contribution was also one between Clarksons and Howdens. But here, the arbitration agreement that determines jurisdiction is between the Employer and the Engineer, whereas the question of contribution is between the entities comprising the Engineer.

[23] The position in *Wealands* is stated in paragraph 1 of the judgement of Mance LJ:

> The claimant in this action, Christine Wealands, is the widow and administratrix of Brian Wealands, who died in an accident on 29 September 1995 involving a scaffold suspended from Hammersmith Bridge where he was working as a shot-blaster. The defendant, CLC Contractors Ltd, is the main contractor which employed Wealands. The first third party is the firm of scaffolding sub-contractors, which erected the scaffold under sub-contract with the defendant. The issue before the court is whether the defendant's claim against the first third party for indemnity and/or contribution must be stayed under the arbitration clause in the sub-contract.

[24] It was also a question of staying a claim in court so that it be arbitrated. The claim in court was the claim of the defendant, CLC Contractors, against the scaffolding firm. The arbitration clause was in the sub-contract between CLC Contractors and the scaffolding firm. The question of an arbitrator's power

— 'jurisdiction' was the word used by Mance LJ — to award contribution arose in the scaffolding firm's stay application because one of the arguments of CLC Contractors in opposing the application was that if an arbitrator had no such power — which was CLC Contractors' stand — then the court must retain it, and to that extent, at least, the arbitration could not cover the dispute between CLC Contractors and the scaffolding firm and stay ought not to be granted. Tuckey J had granted a stay, following the reasoning in *The Eras Eil Actions*, on the ground that since there was a dispute between CLC Contractors and the scaffolding firm with respect to some of the claims outlined in the third party notice and since the parties agreed to refer disputes to arbitration, they must go to arbitration even if the remedy of contribution would not be available to CLC Contractors.

[25] What I would like to point out is that in that case, again, unlike in the present case, the question of jurisdiction in the sense in which I have used that word did not arise to pose a problem.

[26] Another thing I ought to mention about the two cases is this. One of CLC Contractors' submissions in *Wealands* (see para 22) was that 'only by clear words, if at all, could parties confer jurisdiction on an arbitrator to award contribution'. Mance LJ said that there was a valuable discussion of that point in *The Eras Eil Actions* case, but 'It was not necessary there to decide the point, any more than it is here'. I suppose that that was because the dispute had to go to arbitration anyway, whether or not the arbitrator would have power to award contribution. Likewise I do not find it necessary to deal with the question whether an arbitrator has power to order contribution as it is irrelevant because the arbitrator in this case does not in the first place have jurisdiction under section 4.07 of the Agreement to arbitrate disputes between Ranhill and Safege.

[27] My learned brothers, Richard Malanjum and Nik Hashim JJCA, have expressed their concurrence with these grounds of judgement.

Appeal allowed.

Reported by AG Kalidas